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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Guardianship of A.P., a Minor.	
PANDURANGAN V. et al. Petitioners and Appellants, v. SARAVAN P., Objector and Respondent.	A126843 (San Mateo County Super. Ct. No. 119051)

In this appeal, a maternal grandfather and uncle appeal from an order denying their petition for permanent guardianship of their now 13-year-old nephew and grandson. They contend the court erred in awarding custody to the father rather than to them of the child, whose mother is no longer living and who has been diagnosed with autism. Like the trial court, we consider this to be a difficult case, but we find no basis for disturbing the manner in which the court exercised its discretion and we shall therefore affirm its judgment.

Background

On June 26, 2009, the maternal uncle and grandfather filed a petition for permanent guardianship of the child. On the same day, the court granted their ex parte petition for temporary guardianship pending the hearing on their petition for appointment of a permanent guardian.

On July 22, 2009, the guardianship investigator for the probate court filed a guardianship investigation and assessment report. The investigator described the child's

living situation since his birth as complex. He was born in the United States in 1997, but six months later went to India to live with his maternal grandparents and maternal uncle. He remained with them, traveling between India, the United States and England, until he was five years old. The parents visited the child regularly, often staying for substantial periods of time. In 2002, he returned to the United States to live with his parents. In 2004, the mother was diagnosed with lung cancer and she and the child moved to India where they lived with her family while the mother underwent treatment. The father stayed in the United States because his pending citizenship application prevented him from leaving the country. The mother died in May 2005.

Immediately following the mother's death, father took the child to live with his paternal relatives in another city in India. The father enrolled him in a school for children with special needs before returning to the United States. Six weeks later, the father and the maternal uncle agreed that the child's functioning had seriously declined while at the school. They decided the child would return to England to live with the maternal relatives. The father appointed the maternal uncle and aunt as the child's temporary guardians during the child's stay in England and in the father's absence. The father was living in the United States at the time but "visited his son in England for extended periods of time and sometimes lived with maternal relatives for extended periods of time and he would reimburse them for his expenses."

In 2008, the minor moved with his maternal relatives to the United States. They initially settled in Walnut Creek and later moved to Millbrae. A room in the family's house was maintained for father when he visited.

In June 2009, "maternal relatives learned that the father was planning to take the minor back to India very soon and the trip would be one-way." Believing that such a move would not be in the child's best interest, they filed the present guardianship petition. The father told the investigator that he is planning to take the minor to India. He has found a school there where the child "would receive a mainstream education and enjoy 'a lot of social interaction.' " He plans to take care of his child in India and believes that the move would allow for the paternal relatives to spend time with their grandson.

During his conversation with the investigator, the father "did not address his son's emotional needs, other than that he needs social interaction." This silence prompted the investigator to question "whether he recognizes his son's developmental disability."

According to the report, the child was diagnosed when he was five years old with a high functioning form of autism. He is described as "a sensitive, likeable boy, eager and motivated to learn, and he is above average in his academics." His uncle described his "abnormal behavior" to the investigator as including "stereotypic and repetitive patterns, rigid routines and inflexibility" as well as "emotional instability, lack of insight, initiative and imagination." Attached to the report is a copy of the care plan adopted by the uncle addressing the child's "educational, social, behavioral and school-based needs." When interviewed privately, the child told the investigator that he "wants to live with his grandparents, his uncle, his aunt and his cousin, saying 'I find it happy here.' " The child is aware that his father does not want him to stay with his maternal relatives but said, " 'I don't understand why my dad is taking me from here.' "

The guardianship petition was heard on August 10, 2009. At the conclusion of the hearing the court indicated that, having considered both the father's parental rights and the best interests of the child, the guardianship petition was denied and custody was awarded to the father. The maternal relatives filed a timely notice of appeal.

Discussion

Family Code[1] section 3040, subdivision (a) provides, in pertinent part: "Custody should be granted in the following order of preference according to the best interest of the child[:] [¶] (1) To both parents jointly . . . or to either parent. . . . [¶] (2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment." Section 3041 provides in relevant part: "(a) Before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the

[1] All statutory references are to the Family Code unless otherwise noted.

best interest of the child. . . . [¶] (b) Subject to subdivision (d), a finding that parental custody would be detrimental to the child shall be supported by clear and convincing evidence. [¶] (c) As used in this section, 'detriment to the child' includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents. [¶] (d) Notwithstanding subdivision (b), if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary."

In *Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1153, the court recognized that " 'the right of parents to retain custody of a child is fundamental and may be disturbed " '. . . only in extreme cases of persons acting in a fashion incompatible with parenthood.' " [Citations.] Accordingly, the Legislature has imposed the stringent requirement that before a court may make an order awarding custody of a child to a nonparent without consent of the parents, "it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child." ' " The court explained, "The enactment of former Civil Code section 4600, now Family Code section 3041, changed the focus of a custody dispute between a nonparent and a parent, from the unfitness of the parent, to the detriment to the child. 'The Legislature did not, however, intend to disturb the judicial practice of awarding custody to nonparents in preference to parents only in unusual and extreme cases.' " (*Ibid.*)

In *H.S. v. N.S.* (2009) 173 Cal.App.4th 1131, 1140, the court elaborated on the interplay of subdivisions (b) and (d) as follows: "Section 3041, subdivision (b) provides that detriment must be shown by clear and convincing evidence, subject to subdivision (d). Under subdivision (d), de facto parent status may be established by a preponderance

of the evidence, and once shown, this status creates a rebuttable presumption of detriment. Reading the statutory provisions together, the statute does not alter the ultimate clear and convincing evidence standard imposed on a nonparent, including a de facto parent. Rather, the statute merely permits clear and convincing evidence of detriment to be proven by means of a rebuttable presumption when a nonparent has acted as the child's de facto parent for a substantial period of time. Thus, section 3041, subdivision (d) does not eliminate the clear and convincing requirement for detriment, but simply allows it to be met through the use of a rebuttable presumption." (Italics omitted.) The court explained that the rebuttable presumption found in subdivision (d), "reflects a legislative assessment that ' "continuity and stability in a child's life most certainly count for something" ' and 'in the absence of proof to the contrary, removing a child from what has been a stable, continuous, and successful placement is detrimental to the child.' " (*Id*. at p. 1138.)

In this case, the court denied the request for guardianship by the maternal family members. The court explained, "[W]e look at the . . . best interest of the child and we also have to look at a parent's rights. And so we look at those issues and we see that over the last few years now [the child] has been, I think, nurtured by the maternal grandfather and the maternal uncle. And he has done well in the schools he's been at and as he is functioning at a high level. It's an attribute to the hard work that's gone on behind the scenes. [¶] And looking at that, coupled or contrasted it against the father's rights, the fact that the son was allowed to live with his grandfather and uncle doesn't by itself justify a father giving up his rights as a parent." The court acknowledged that "this [is] a very difficult case" and that there is no "absolute, clear and right answer," but concluded that "[by] the same token, it comes down to a parent's rights. The fact that a father here has done nothing so egregiously, so inappropriate as to warrant termination of those rights." The court added, "I can only hope that father makes good decisions regarding his son that are in the best interest of his son. But the reality is, this father still has the obligations and duties and responsibilities of a father and that, in my view, I think, weighs stronger than the intentions of the maternal grandfather and the maternal uncle in that the legal rights

here are that of a father's. And looking at the best interest of the child, I suspect this child will succeed under both scenarios."

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) Under this test, we must uphold the trial court "ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*Ibid*.)

The maternal relatives contend that the court abused its discretion insofar as it failed to apply properly the rebuttable presumption found in subdivision (d) of section 3041.[2] They argue that because the evidence established that they were de facto parents under subdivision (c) of section 3041, they were entitled as a matter of law to custody absent a showing by father sufficient to rebut the presumption. They suggest that because the father failed to meet his burden, the court lacked the discretion to deny their petition. The parties did not make any specific arguments before the trial court as to whether the presumption was applicable and whether it had been rebutted and no specific findings of fact were requested on those issues. Nonetheless, the court's comments do not, as the maternal relatives suggest, reflect an improper application of the statute. The court indicated that it was considering both the best interests of the child and the father's parental rights. The court concluded that the child's interests would be served equally well under either custody arrangement and thus, that the father's parental rights took precedence under the statutory scheme.

The court's finding that the child would succeed under either custody arrangement and, thus, that the best interest of the child did not require granting custody to the

[2] Without attempting to tie these facts into their legal argument, the maternal relatives also point out that in her will the mother stated that her husband "became aloof and detached" following her diagnosis with cancer, that he visited her only once in India after she returned for treatment, that she was opposed to placing their son in a "resident school" as the father had suggested, and that she "appointed" her father as the guardian for the person and property of her son and her mother as the alternate guardian.

maternal relatives, is supported by substantial evidence. According to the chart prepared by the uncle, the child lived with his father for a majority of the first six years of his life. Over the next six years, the father visited regularly and communicated often with the child by phone and over the Internet. The father and child took a number of trips together while the child was in England and took a five-day trip to Seattle while the guardianship proceedings were pending. The child calls the father "daddy" and while he expressed a desire to remain with his maternal relatives, he also indicated that he loves his father and wants to be able to visit him as well. The maternal relatives make much of the father's decision to place the child in a boarding school immediately after his mother's death. While this decision in retrospect appears to have been a poor choice, the father's ability to recognize his mistake and alter his child's placement reflects positively on his ability to parent. Taken as a whole, this evidence is sufficient to rebut the presumption that the best interest of the child requires placement with the maternal relatives and that placement with the father would be detrimental to the minor. On this record, we cannot say that the court abused its discretion in denying the petition.

Disposition

The order denying the guardianship petition is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Siggins, J.